



Overseas Custody and Visitation Issues Handout



Please note that this Information Paper only provides basic information and is not intended to serve as a substitute for personal consultations with a Legal Assistance Attorney.

MY HUSBAND AND I ARE SEPARATING. HOW DO CUSTODY AND VISITATION GET DECIDED? WHAT'S THE BEST SOLUTION?

If the two of you are able to reach agreement on the terms for child custody and visitation, then they should be set out in a separation agreement. The more specific the terms of your agreement, the better and easier it will be (ordinarily) to enforce. If you and the other parent cannot agree, then it will be up to the courts to decide the issues of child custody and visitation, normally during your divorce.

WHAT COURT DECIDES CHILD CUSTODY AND VISITATION?

If the child is living overseas, these issues can be determined by the courts in the country where he or she resides. However, if the child is not a citizen or permanent resident of that country, most of the time it is a court in the United States that decides the issues of custody and visitation, and this usually occurs when the child involved is living within the state where the lawsuit for custody or visitation is filed. When the child is located in the U.S., the proper place to file the suit would be the county where the child is located. When it's necessary to do so overseas, you may file suit in the country where the child is located.

CAN A LEGAL ASSISTANCE ATTORNEY HELP ME FILE A LAWSUIT FOR CHILD CUSTODY OR TO ENFORCE VISITATION?

No, you will have to hire a civilian attorney for that. We can, of course, help you to find an attorney to help you obtain child custody and advise you on custody matters generally.

DO MOTHERS AUTOMATICALLY GET CUSTODY OF THEIR CHILDREN WHEN A SEPARATION OCCURS?

The courts of most states do not establish an automatic preference for either mother or father, but they do look very closely at which parent will best promote the welfare and interests of the children. Ordinarily, the best interest of the child is paramount.

WHAT KINDS OF FACTORS DO THE COURTS CONSIDER IN GRANTING CUSTODY?

They usually look at who has primarily taken care of the child during the marriage (washing, feeding and clothing the child, for example, or helping the child with homework), who has the best approach to discipline, who has cared for the child since separation (if the couple has already separated), what work

schedules either or both parents have, and how each parent can provide for the physical, emotional, educational, religious and social needs of the child.

CAN I FILE FOR CUSTODY HERE IN GERMANY (KOREA, ITALY, JAPAN, ETC.)?

You certainly can ask the courts in the country where you or your spouse is stationed to grant you custody of your son or daughter if he or she is living in that country. In almost all cases the physical presence of the child within the court's jurisdiction (i.e., in the area served by the court) is essential to consideration of a custody claim. If you do so, then the courts of that country (Germany, for example) will decide "which parent has the right to determine the whereabouts of the child," which is what custody is all about. In many states, foreign court orders will be honored just as if it was a court order of another state or the state itself. The Uniform Child Custody Jurisdiction Enforcement Act that has been adopted in most states requires the state to honor child custody decisions from other states and foreign countries if the other state or country had jurisdiction over the child when the decree was made.

BUT IF I GET A U.S. CUSTODY ORDER, WON'T I HAVE TO GO THROUGH THE SAME ROUTINE WHENEVER I'M ASSIGNED TO A NEW DUTY STATION IN A DIFFERENT STATE?

No. Under the provisions of the Parental Kidnapping Prevention Act, a federal law, and also of the Uniform Child Custody Jurisdiction Enforcement Act, a law passed by all 50 states, each state is **required** to recognize and honor the custody decrees of its sister states. The court must enforce the other state's custody order as if it were its own order and is not allowed to modify the other state's order until the other state abandons jurisdiction.

IF THE OTHER PARENT DOES NOT LIKE THE PRESENT CUSTODY ORDER, CAN HE OR SHE FILE FOR CUSTODY IN ANOTHER STATE?

Normally, no. Under the Uniform Child Custody Jurisdiction Enforcement Act and the Parental Kidnapping Prevention Act, the court in a custody case that makes an initial custody determination retains exclusive jurisdiction over the custody until the court in the other state finds that it no longer has jurisdiction. Only if the first court has released or transferred jurisdiction to the new state court may that court assume jurisdiction to hear the custody case (unless there is an immediate and clear emergency affecting the child's welfare).

IF I WANT TO GET A CUSTODY ORDER IN THE OVERSEAS COUNTRY WHERE I'M STATIONED, WILL THE COURTS THERE ALLOW IT?

As a general rule, yes -- as long as two conditions are met--

- The child was physically present in that country when the court order was entered; and
- The child continues to be present in that country.

A judge will **usually** refuse to enter a custody ruling if the child involved is **somewhere else**, rather than within the court's jurisdiction (the area served by the court). Thus if the mother is stationed in Heidelberg but the father and their daughter are back in Ohio, the German courts are not likely to allow mom to proceed with a custody case there. If, on the other hand, mom and her daughter were in Germany and mom wanted to file there for custody because of an emergency involving the father --

such as physical or sexual abuse, attempted kidnapping, substance abuse or domestic violence -- the courts there would probably allow it. These are subject to the law of the foreign country, so check with local attorneys.

WHAT IF I GET A CUSTODY ORDER IN THE STATES BUT I GET “UNACCOMPANIED” DEPLOYMENT ORDERS OVERSEAS. CAN’T I JUST LET MY FOLKS LOOK AFTER MY CHILDREN TILL I GET BACK? AM I REQUIRED TO TELL MY EX-SPOUSE?

A. If there is a court order or a state law which says so, then you **MUST** tell the other parent about any move for the children. Some states (like Virginia) require advance written notice of change of address to the court and the other parent whether or not the parent is the primary custodian. If the other parent consents or her address is unknown, you may be able to let your parents care for your children in your absence, but you should get that consent in writing or, if appropriate, get a court order. As for “telling your ex” in the absence of a statute or order, your best course of action is to do so. As a matter of fairness to the other parent of your child, you should advise him or her of this important change in circumstances. Remember that “the best interest of the child” is the standard all courts use to judge custody matters, and this is presumed to be custody with one of the parents, not some third party (like your parents). If you are gone, the usual choice of the judge for a custodian will be the other parent, unless you can show that the other parent is unfit by reason of abandonment, abuse, neglect, or some other conduct inconsistent with parenting duties. Simply because you have been granted custody in a court order does not mean that you can “cut out” the other parent from caring for the children and delegate this to whomever you wish, regardless of their relationship with the children. Ask yourself how it will look to a judge later on if you withhold information of your departure just so that the other parent doesn’t “get the children.” Remember that the other parent can return to court; file a motion to modify custody, and present evidence that he or she is the best choice for the children’s custodian while you are away. Of course, if your ex-spouse consents, then the court can transfer custody to your parents in a “consent order” without the need for a trial.

WHAT IF MY EX-SPOUSE FINDS OUT THAT I’M GONE OVERSEAS ON AN UNACCOMPANIED TOUR OF DUTY? DOES THAT MEAN HE OR SHE CAN JUST TAKE MY CHILDREN? THAT’S NOT FAIR!

A. Unless your ex-spouse’s parental rights have been terminated by the court (or had visitation rights suspended), he or she still has certain rights to see the children. And if there is a custody dispute, it will be up to the judge to decide “what’s fair,” not either of the parents. Your ex-spouse will need a court order to get custody of your children if you leave. He or she will have to apply to the court for an order and, except in an emergency, will have to serve you with a copy of the motion or petition and a notice of hearing for the trial. As soon as you’re served with legal papers, take them to the nearest legal assistance office so the attorneys there can advise you on what to do. In some jurisdictions, such as Washington, DC, it’s a crime for a parent with custody under a court order to remove a child from the state with intent to deprive the non-custodial parent of visitation rights. It may be illegal in some states to take the children out of state after a custody proceeding is commenced but before an order is entered. At a minimum, even though there is no prohibition in a court order against removing the children from the jurisdiction, and “intent to deprive” might not be proved, if the move results in a disruption of the court-ordered visitation, the custodial parent may be facing contempt charges. Make sure you check it out with a legal assistance attorney or civilian lawyer (who knows the military and state rules) before proceeding.

CAN THE COURT AWARD ATTORNEY'S FEES TO ME IN A CUSTODY CASE?

Under the law of some states, if the person asking for attorney's fees is acting in good faith and is unable to afford the legal expenses of the lawsuit, it is possible (but not mandatory) for the court to award reasonable attorney's fees as part of the custody order. This is not the rule in every state, and you would need to check with your legal assistance attorney or civilian lawyer to find a specific answer to this question.

ONCE IT'S FILED, CAN A CUSTODY ORDER BE CHANGED?

Yes, custody orders are never *permanent*. However, once a parent is awarded custody in a court order, the judge can change the custody order only if there is a substantial change of circumstances affecting the best interest and welfare of the child or children.

WILL MY SEPARATION AGREEMENT PROTECT ME FROM THE OTHER PARENT SNATCHING MY CHILD?

No. A separation agreement which hasn't been incorporated into a court order or divorce decree is **only a contract** between you and the other parent, not a court order. A court order is enforceable by contempt of court. Court orders of one state can be filed and registered in another state and thus be treated as if they were issued by the second state for purposes of enforcement. None of this applies to separation agreements which are not incorporated into a divorce decree. If, on the other hand, your separation agreement has been **incorporated into a court decree** in your home state, then it is a court order and is enforceable by contempt of court. That does not mean the child could not be taken, but it does mean there will be adverse legal consequences for doing so.

IF MY SPOUSE IS GRANTED CUSTODY, WILL I GET VISITATION RIGHTS?

Ordinarily the noncustodial parent is entitled to reasonable visitation rights with a minor child except in extraordinary situations, such as when the noncustodial parent has a history of abusing the child. Visitation can be flexible and unstructured, assuming the parties can get along and agree on the times and terms of visitation or it can be highly structured and rigid, with certain days and times set out with great specificity. You can outline the details of visitation in a separation agreement, which will become the court's order if it is incorporated into your divorce decree.

WON'T CUSTODY BE SETTLED WHEN I OBTAIN A DIVORCE?

Divorce decrees do not necessarily settle custody matters. In some states, such as New York and Wisconsin, all issues concerning the marriage and separation -- custody, child support, visitation, etc. - - are handled at or before the divorce is granted. In other states, such as North Carolina and Delaware, the divorce is handled separate from these issues, and a custody order can be entered before or after a final decree of divorce or dissolution. In those states, a custody or visitation order can be entered before or after a final decree of divorce. In any event, you should remember that you must file a request with the court (sometimes called a complaint, petition or motion) in order to get the court to consider the issue of child custody or visitation regardless of whether it's at the time of divorce or at another time.

MY EX-HUSBAND HAS LEGAL CUSTODY OF OUR DAUGHTER. HE SAYS HE'S GOING TO TAKE HER OVERSEAS WITH HIM TO HIS NEXT ASSIGNMENT. CAN HE DO THAT?

Yes -- unless a judge orders him not to take her. A parent with legal custody can take a child with him wherever he goes to live in the absence of a court order prohibiting this.

CAN HE GET A PASSPORT FOR HER? SHE'S ONLY 11.

The U.S. Department of State issues almost 1 million passports annually to children under 18. These passports are valid for 5 years (as compared to an adult passport, which is good for 10 years). He can get a passport for her as well as a military dependent ID card (except under certain circumstances, you have to be 10 years old or above to get one of these).

HOW DO I GET A PASSPORT FOR A CHILD?

Either parent can apply for a passport for a child who is a U.S. citizen. The parent who applies does not have to be an American citizen. The application is available at designated Postal Service offices. The State Department requires both parents' consent to obtain passports and visas for travel of children under age 14. If one parent is unavailable to sign the application, a signed letter or statement from the absent parent consenting to the travel must accompany the application. . Issuance of a passport to one parent doesn't automatically stop the other one from obtaining a second passport for the child. Once it is issued, the passport's use is not "tracked" or controlled by the State Department. Either parent can request and obtain information as to the issuance of a passport for a child.

For further information or help feel free to make an appointment with a Legal Assistance Attorney, DSN 421-4152, Civ 0711-729-4152.

REVIEWED BY: CPT Michael Watts, Chief, Client Services

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References:

www.divorcenet.com

http://family-law.freeadvice.com/child_custody/

State by State laws on Divorce and Custody - http://www.law.cornell.edu/topics/Table_Divorce.htm

Passport requirements: 8 U.S.C. 1101(3); and Sec. 236, Public Law 106-113